

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Bair Hugger Forced Air Warming Devices Products Liability Litigation) File No. 15-md-2666
) (JNE/FLN)
) February 18, 2016
) Minneapolis, Minnesota
) Courtroom 12W
) 9:30 a.m.
)
)
)

BEFORE THE HONORABLE JOAN N. ERICKSEN
UNITED STATES DISTRICT COURT JUDGE

AND THE HONORABLE FRANKLIN D. NOEL
UNITED STATES MAGISTRATE JUDGE

(STATUS CONFERENCE)

APPEARANCES

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22 transcript produced by computer.
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PROCEEDINGS

(9:36 a.m.)

IN OPEN COURT

4 THE COURT: Hello again. Please be seated,
5 everybody. We thought we might have Judge Leary with us
6 today, but he is unable to attend this morning. So I've got
7 a seating chart that I gather was prepared by the lawyers
8 that were sitting at the table and given to my court
9 reporter. Have you all met Maria?

10 Okay. Holley is one of my law clerks, and she's
11 going to help here. And presiding with me is Judge Frank
12 Noel, my friend, and we'll be doing the case together. So
13 if you can't get ahold of me, get ahold of him. So we're
14 here.

15 Now, what I've got is David Hodges, is that right?
16 That is you? I just met you when you were coming in.

17 MR. HODGES: Yes, Your Honor.

18 THE COURT: And Anne Andrews.

19 MS. ANDREWS: Good morning, Your Honor.

20 THE COURT: Good morning, from Florida, right?

21 MS. ANDREWS: California.

22 | THE COURT: California, darn it.

23 And Jan Conlin from my neighborhood

24 MS. CONLIN: Good morning, Your Honor.

25 | THE COURT: Genevieve Zimmerman.

1 MS. ZIMMERMAN: Good morning, Your Honor.

2 THE COURT: Ben Gordon.

3 MR. GORDON: Good morning, Your Honor.

4 THE COURT: Florida.

5 MR. GORDON: Yes, ma'am.

6 THE COURT: Mr. Blackwell, Jerry Blackwell.

7 MR. BLACKWELL: Yes, Minneapolis, that's correct,
8 Your Honor.

9 THE COURT: And that's for 3M now. And Ben Hulse.

10 MR. HULSE: Yes, Your Honor, with Mr. Blackwell.

11 THE COURT: Right. Bridget Ahmann.

12 MS. AHMANN: Yes, Your Honor, good morning.

13 THE COURT: And Mary Young.

14 MS. YOUNG: Good morning, Your Honor.

15 THE COURT: Good morning. All right. Well, let
16 me find out whether there's anybody who is not sitting up at
17 the table who feels you should be sitting at the table,
18 which is another way of bringing up the topic of the
19 leadership committee.

20 I've got a proposed leadership structure and I
21 don't -- oh, do we have our person on the phone, by the way?
22 Mr. Person on the phone, are you there?

23 MR. JACKSON: Hi, Judge. It's Keith Jackson. How
24 are you?

25 THE COURT: Great. Can you hear us okay?

1 MR. JACKSON: Yes, ma'am, I sure can.

2 THE COURT: And, Mr. Jackson, you've got a couple
3 cases; is that right?

4 MR. JACKSON: Actually, four filed within the
5 district as of this morning, Judge, and two outside the
6 district.

7 THE COURT: Okay. And you are from Birmingham,
8 Alabama, correct?

9 MR. JACKSON: That's correct, Judge.

10 THE COURT: And you were not seeking to be on the
11 leadership?

12 MR. JACKSON: I am not. That is correct.

13 THE COURT: Okay. We had a letter from a law firm
14 in New Orleans that purported to seek membership in the
15 leadership committee. Is that person here? There's
16 somebody here. Okay, So tell me your name again.

17 MS. JOCHUM: Julie Jochum.

18 MR. PFLEEEGER: And Bryan Pfleeger, Your Honor.

19 THE COURT: Okay. And have you had a chance to
20 talk with these folks?

21 MR. PFLEEEGER: Yes, Your Honor.

22 THE COURT: And are you okay with the leadership
23 structure that they've proposed?

24 MR. PFLEEEGER: I have not seen the structure.

25 THE COURT: All right. Here's what it says. This

1 is what was proposed. And before we go any farther, I want
2 to put a leadership structure in place, whether it's this
3 one or some different one is going to be the first topic
4 while we're at it.

5 Okay, so I've got co-lead counsel proposed as Ben
6 Gordon, Genevieve Zimmerman, and Michael Ciresi.

7 Plaintiff's executive committee Anne Andrews, Chris Coffin,
8 David Hodges, Behram Parekh. And I just met him, so you
9 would think I could pronounce his name better than that.

10 MR. PAREKH: That was perfect, Your Honor.

11 THE COURT: Oh, we're going to get along fine.
12 And then as liaison counsel, I've got David Szerlag from
13 Pritzker Olsen, who I also just met.

14 MR. SZERLAG: Yes, Your Honor.

15 THE COURT: Steering committee: Paula Bliss,
16 Boston, Massachusetts; Noah Lauricella, Minneapolis; Kyle
17 Bachus, Denver; Richard Lewis, Washington, D.C.; Jeffrey
18 Bowersox, Portland, Oregon; Lee Ann McGartland from Fort
19 Worth, Texas; Martin Crump, I know you're here, I just met
20 you, Davis & Crump in Gulfport, Mississippi; Mark O'Mara,
21 Orlando, Florida. Yeah, I don't know, it's not Annesley,
22 it's Annesley. We just had a long conversation about that
23 too. I know it's Irish.

24 MAGISTRATE JUDGE NOEL: He's here. I see him.

25 THE COURT: Richard Schlueter; Kyle Farrar from

1 Houston, Texas; Stuart Talley from Sacramento, California;
2 and Kristine Kraft from St. Louis, Missouri. So that's what
3 I've got.

4 And do you folks want to talk to these people? I
5 hesitate to go forward until you've had a chance to interact
6 with each other on the topic of whether you want to
7 participate or not on the steering committee.

8 MR. GORDON: Your Honor, if I may, I'd be happy to
9 address this, Ben Gordon. I spoke yesterday with
10 Mr. Pfleeger in Mr. Hingle's office because we hadn't known
11 until just recently after PTO 3 was issued that they had
12 sought participation in leadership. We, frankly, don't know
13 them. Well, we reached out yesterday because we were
14 inquisitive as to what they were seeking, and it's my
15 understanding they are seeking a position on the steering
16 committee. I don't know if that's Mr. Hingle or
17 Mr. Pfleeger or Ms. Jochum. But I guess on behalf of the
18 rest of the group, I would say we haven't had any experience
19 with them. We don't know, frankly, what their experience
20 is, what they bring to the table. We've tried to have a
21 very open, robust process for including discussion with
22 everyone in the country with these cases, and I believe that
23 we copied everyone with a filed case on our proposed
24 leadership structure, and no one reached out to us, which is
25 why I reached out yesterday.

1 So I guess I'm struggling a little bit, Your
2 Honor, with why, you know, what it is that they bring to the
3 table and whether we would want to discuss including them or
4 you would want to discuss including them. I'm not opposed.

5 At the same time, we have had a very lengthy and
6 fertile relationship with everybody in this room, who is
7 everyone that you read on the list with one exception who
8 missed his flight this morning.

9 THE COURT: Oh-oh.

10 MR. GORDON: Yeah. And we have a good team
11 together. So, again, I don't want to speak out against
12 them, but I don't know them, and I don't know really what
13 their experience is.

14 THE COURT: All right. Why don't you come on up
15 and introduce yourselves?

16 MS. JOCHUM: Julie Jochum.

17 THE COURT: Welcome.

18 MS. JOCHUM: Julie Jochum. I'm from New Orleans.
19 We have many, many cases in different MDL courts all across
20 the country. We currently have nine filed cases and two
21 more that are ready to go for this Bair Hugger. And we have
22 two new associates ready to go to help and work and do
23 document review or whatever is needed, and seeking a
24 position in the leadership counsel for the first time in an
25 MDL panel, but we're ready and eager to help.

1 THE COURT: And so who would it be at your firm
2 who would be on the steering committee?

3 MS. JOCHUM: Either me or myself or Bryan
4 Pfleeger.

5 THE COURT: And do we have resumes and information
6 about you?

7 MS. JOCHUM: Yes, I e-mailed all of that.

10 MS. JOCHUM: Yes.

13 MS. JOCHUM: Yes, ma'am.

20 MS. JOCHUM: Yes.

21 THE COURT: All right, thanks. So don't go away
22 at the end. At the end of the whole hearing, I've got a
23 chambers back behind the wall here, maybe I'll see you
24 there.

25 MR. GORDON: Your Honor, we did not submit a

1 proposed order, but we can do that issue if you'd like.

2 THE COURT: That was one of the things we
3 discussed.

4 MAGISTRATE JUDGE NOEL: Indeed. And they should.

5 THE COURT: All right. We'll look for that.

6 MS. ZIMMERMAN: We'll do that today.

7 THE COURT: It's my hope that we can get this
8 litigation, you know, under control and stay on top of it.
9 Get it resolved, if possible. Get it all packaged up and
10 either sent back for trials or do some trials ourselves in a
11 reasonably expeditious manner. I'm very current on my
12 cases, and I don't see any reason why we'd have to have any
13 delays, so that's my hope.

14 And an MDL is different from a normal case. I
15 think partly in that I want you to feel comfortable to have
16 informal contact with me if you want. It is my view of my
17 role to expedite the process and make sure that there aren't
18 any unnecessary delays. So that's my hope.

19 So don't be afraid of me if I say something that
20 doesn't seem to make sense or is contrary to what your
21 experience is and you want to ask me why I'm doing it or
22 there's a particular problem, I really hope that you'll let
23 me know, because I cannot be helpful to you if you're not
24 straightforward with me about what's going on. Not really
25 straightforward, I know you'd be, but if you could be more

1 candid than even you normally are, less reserved, less -- I
2 don't know, I always used to be afraid of judges, so it
3 probably doesn't do any good to say please don't be, but I
4 hope you won't be. How about you, Frank? Do you want them
5 to be afraid of you?

6 MAGISTRATE JUDGE NOEL: Yeah, fear me. It's a
7 good cop, bad cop routine.

8 THE COURT: You have a very colorful tie.

9 MAGISTRATE JUDGE NOEL: I am also very accessible,
10 and please call, and don't hesitate to raise whatever issues
11 you have, and we'll try to work them out as best we can.
12 And if they require motion practice or briefing or whatever,
13 we can do that. If we can just do it with a telephone call
14 and have a conversation among the disputing parties,
15 hopefully, it can help you resolve it, and see if we can't
16 get it worked out, so don't be afraid.

17 MR. GORDON: Thank you.

18 THE COURT: And we live near each other. We've
19 known each other for a long time. We work together. We'll
20 stay in communication about it. But, again, if there's
21 something that you feel like you're getting any sort of
22 mixed signals, that's not going to help the ship stay in the
23 right direction, so let us know.

24 The next item that I have listed was the number
25 and status of cases that are transferred into the master

1 list. So some of this was addressed, and thank you very
2 much for submitting the joint case management report.

3 You probably noticed I phrased -- so I didn't
4 order that the case management report come in because I
5 hadn't actually set up the leadership structure. So you
6 noticed it was phrased as an invitation. You said you could
7 do it, and so if you want to do it, I'd be happy to see it,
8 and it was very helpful. I saw somewhere in here that you
9 expect what was it 1200 or so cases?

10 MR. BLACKWELL: I think it was thousands, Your
11 Honor.

12 THE COURT: Thousands?

13 MR. BLACKWELL: Yes, Your Honor.

14 MR. GORDON: And, Your Honor, we'd be happy to put
15 a little meat on that bone and discuss it further if you
16 wish.

17 THE COURT: How many do we have so far?

18 MR. BLACKWELL: 139, Your Honor.

19 THE COURT: And that does not include the 37 or so
20 in Ramsey County?

21 MR. BLACKWELL: That's correct.

22 THE COURT: What about these other state court
23 cases? There are five listed in other states. I was
24 actually a little bit surprised that there weren't any
25 Delaware cases because doesn't 3M have joint citizenship

1 with Minnesota and Delaware? I'm not trying to rustle up
2 any business --

3 MR. BLACKWELL: That's correct.

4 THE COURT: But I was in private practice. And
5 there aren't any Delaware cases, as far as we know.

6 MR. BLACKWELL: No, Your Honor.

7 THE COURT: Well, what about, well, there's what,
8 Wiltshire, Third Judicial Circuit in Madison County,
9 Illinois. So is there not complete diversity? Is that
10 what's going on there? Why isn't that removed? This can be
11 kind of a problem if there are outliers.

12 MS. ZIMMERMAN: Your Honor, if I may. I believe
13 that none of the attorneys, the plaintiff's attorneys that
14 are present in this courtroom to my knowledge are counsel of
15 record in any of these five outlying state cases. But I
16 suspect what's happened is that they have sued, in addition
17 to 3M, they've sued either the orthopedic surgeon or the
18 hospital in the state.

19 THE COURT: That was my guess. And,
20 Mr. Blackwell, I saw people's names here, and so my guess
21 was that those people are in the same, you know, they
22 destroy diversity.

23 MR. BLACKWELL: That's right, Your Honor.

24 THE COURT: Wasn't there some litigation maybe in
25 the Walton case about improper joinder or was that a

1 different case I was preparing for that I remember?

2 MR. HODGES: No, you're correct, Your Honor.

3 THE COURT: And the nondiverse person remained in
4 the case there, correct?

5 MR. HODGES: The nondiverse person is still in the
6 case, but they allege fraudulent joinder and removed the
7 case and were successful on that point. It's in federal
8 court.

9 THE COURT: So the order that I read.

10 MR. HODGES: Prestera is the nondiverse defendant.
11 He is still in the case.

12 THE COURT: Okay, but the Judge's Order said that
13 person can't possibly be found liable or something and,
14 therefore, diversity wasn't -- I read it so fast I --

15 MR. HODGES: I don't recall exactly what the Judge
16 said. It was a couple years ago, if I recall correctly, but
17 something to that effect.

18 MR. HULSE: Your Honor, if I may, the difference
19 there is Mr. Prestera is a 3M sales representative, so
20 unlike these other cases, which are in state court where the
21 hospital or the orthopedic surgeon is in the case, so that
22 was what prompted the fraudulent --

23 THE COURT: Okay, now it's coming back to me. I
24 think that paragraph actually said something about there's
25 no precedent for a sales representative and then there was a

1 case cited.

2 MR. HULSE: Exactly right, Your Honor.

3 THE COURT: Okay. This is what happens when I
4 read too fast.

5 Well, Mr. Blackwell, keep us informed and work
6 with our liaison counsel from the plaintiff's side to make
7 sure that there isn't anything that happens in those cases
8 that puts a stick in spokes of the --

9 MS. YOUNG: Your Honor, if I may, the Martin case
10 was removed yesterday to federal court. That was in Orleans
11 Parish, Louisiana.

12 THE COURT: All right.

13 MS. YOUNG: And that involves also Xarelto drug
14 claims, so it's our expectation that those may be severed,
15 and that case will make its way to this court.

16 THE COURT: Thank you. That's all we really need
17 to know about that, don't you think?

18 MAGISTRATE JUDGE NOEL: Yes.

19 THE COURT: Okay.

20 MR. SZERLAG: Excuse me, Your Honor.

21 THE COURT: Hi.

22 MR. SZERLAG: I'm David Szerlag, and as fresh
23 liaison counsel, I'll make it a point to make sure that we
24 reach out to those individuals in the state court, and we'll
25 try to get it and provide the status to the Court as well.

1 THE COURT: And congratulations on your
2 appointment as liaison counsel.

3 MR. SZERLAG: Thank you.

4 THE COURT: All right. The common benefit order,
5 can you folks work on that?

6 MS. ZIMMERMAN: Certainly, Your Honor. We just
7 wanted to see if the Court had any indications or
8 preferences. Sometimes judges express some preferences at
9 the beginning and, if not, we'll confer amongst ourselves
10 and present something to the Court.

11 THE COURT: It would be most helpful if you could,
12 first, I want to know if there's any disagreement and if you
13 need me, but if you don't need me, I'm content to let you
14 work it out.

15 MS. ZIMMERMAN: Excellent.

16 MR. GORDON: Thank you, Your Honor.

17 THE COURT: Mr. Blackwell, do you care?

18 MR. BLACKWELL: Your Honor, I don't like to say,
19 "I don't care," but I don't care.

20 THE COURT: That's what I thought, and Judge Noel
21 just reminded me that I should at least ask you.

22 Okay. Are there any additional pretrial orders
23 that -- well, I'm sure there will be, but before we talk
24 about that, there was in the joint case management report,
25 there was a request for at least one kind of pretrial order

1 that I think I've already done, and I just wanted to clarify
2 that before we get to whether there are any additional
3 orders that are needed.

4 Somewhere in the joint case management report was
5 a request for an order that any new cases be filed in the
6 MDL. Now, help me, here is my January 11th Order, and I
7 thought that's what I was doing on page 1. So maybe there's
8 something else that has to happen.

9 "Any actions filed whether filed directly in the
10 U.S. District Court for Minnesota or any other U.S. District
11 Court related to this litigation are hereby consolidated
12 into one action. Any tagalong actions later filed and
13 removed to or transferred to this Court or directly filed in
14 the District of Minnesota will automatically be consolidated
15 with this consolidated action. All related actions that are
16 filed and removed to or transferred to this Court as part of
17 this consolidated action are herein referred to as cases."

18 So is there something in addition that has to
19 happen or does that not do it.

20 MR. GORDON: Yes, Your Honor, in past MDLs, we
21 have typically asked the Court to enter what we would refer
22 to as a direct file order, which expressly permits the
23 direct filing and reserves the right of the plaintiff to
24 ultimately seek remand back to the original or the
25 appropriate home district for trial if they so choose. And

1 we plead that in the Complaint that the case might have been
2 filed in say Pensacola or Kansas City or what have you, but
3 to have that actually enunciated in an actual order that
4 would expressly state that the case can be remanded back to
5 its original district if the parties, unless the parties
6 choose to waive lexicon later, it just prevents that whole
7 issue with whether or not someone has unwittingly waived
8 lexicon. And it also prevents folks from having to file in
9 their own district and wait for the case to be transferred.
10 It just saves an extra step.

11 Now, arguably, some of the language you just
12 quoted may help to accomplish the same goal.

13 THE COURT: Okay.

14 MR. GORDON: I would guess I want to look back at
15 the previous direct file orders and see if there's anything
16 we think might need to be added.

17 THE COURT: Mr. Blackwell?

18 MR. BLACKWELL: Your Honor, Ms. Young is prepared
19 to speak to that.

20 MS. YOUNG: And, Your Honor, we've been meeting
21 and conferring with plaintiff's counsel. We're not opposed
22 to that as an administrative process, but want to ensure
23 that the way that order is written doesn't impact the
24 procedural substantive rights of the parties. And so Ms.
25 Zimmerman and I spoke this week and thought that was

1 something we could talk to Your Honor about at the next
2 status conference.

3 THE COURT: Okay, works for me. I'm certainly in
4 favor of it in principle since I thought I already did it,
5 so highly unlikely to stand in your way.

6 And there was one other thing. The thirteenth
7 paragraph on page 7 of the joint case management report has
8 to do with the request for an extension and a stay. And
9 that's another one I thought does counsel respectfully
10 request the defendants be granted an extension of time for
11 responding by motion or answer to the newly filed and
12 forthcoming complaints until we have a date by which
13 defendant shall respond by motion, answer, or otherwise.

14 And, Ms. Young, is this still you? Is that not
15 already covered in the January 11th Order?

16 MS. YOUNG: Your Honor, the parties just wanted to
17 ensure that related to cases that were not yet in existence
18 at the time of your first pretrial order.

19 THE COURT: Okay. So when you are working on the
20 order on the previous issue, do you want to make sure that
21 that's covered in here too?

22 MS. YOUNG: Yes, Your Honor.

23 THE COURT: Okay. And is there anything else that
24 you think you need right off the bat by way of a pretrial
25 order? Confidentiality of documents? Do you need an order

1 for sharing of discovery materials? Do you have a way to
2 have a repository for discovery information that's already
3 there, so people can get ahold of it? What do you need from
4 us?

5 MR. GORDON: Your Honor, there is an issue
6 relating to preservation in a particularized part of the
7 preservation. We're happy to meet and confer and have done
8 so to some extent on general global preservation of
9 documents, but concerning third parties, and this relates to
10 the issue for which we were seeking in chambers discussion,
11 we think it is imperative that something be entered as soon
12 as possible.

13 THE COURT: Okay. So we can take that up.
14 Anything for general consumption?

15 MR. BLACKWELL: For general what, Your Honor?

16 THE COURT: General consumption.

17 MR. BLACKWELL: Your Honor, I'm not sure this is
18 the appropriate time, but the parties do have a difference
19 of opinion in terms of how it is we stage the discovery in
20 the case, for example, whether we emphasize science first or
21 what have you. I am prepared to speak to that and would
22 like to speak to it at the time Your Honor feels is most
23 appropriate.

24 THE COURT: That seems to be its own issue.

25 MR. BLACKWELL: It is.

1 THE COURT: That might be I'm gathering from the
2 submissions in this case and other cases, I mean what used
3 to be other cases, that that's going to be a key point for
4 discussion. So at the moment, I was just wondering if there
5 were any other housekeeping-type matters that would be
6 useful, if anything occurs to you.

13 THE COURT: Okay.

1 MDLs, but it's a Herculean task, and it's something that we
2 need to meet and confer on right away. And if we can't
3 reach some kind of process for understanding the volume of
4 that data quickly before the next status conference, then
5 I'd like to be able to come back to the Court and get some
6 help with it.

7 THE COURT: I'm curious about what's gone on so
8 far with the electronic discovery. And Judge Leary is not
9 boycotting or anything. He just isn't here right now. So
10 maybe when we have an in chambers discussion, can you just
11 informally let me know what's been going on because you've
12 got a couple of cases in the MDL that have been going on for
13 quite a while. The state case seems to be reasonably far
14 along, so there's got to be some electronically stored
15 information that is being dealt with somehow. I mean I
16 would think, but anyway if we could have an informal
17 conversation about that.

18 MR. HULSE: We can discuss that in chambers or at
19 any time that you'd like to. You're absolutely right, Your
20 Honor, that the Walton and Johnson cases were well advanced
21 in discovery. There were substantial productions in those
22 cases, and so this road has been gone down before. There
23 were protective orders in those cases as well, so we do have
24 some precedent to work with here.

25 MR. GORDON: And as you might expect, Your Honor,

1 we're not quite singing kumbaya yet. And we might quibble
2 with the definition of substantial discovery, and the
3 reasons for what we believe are anemic production so far.
4 We would probably be better off discussing in chambers.

5 MR. HULSE: I don't think I can sign on to anemic,
6 but I'm sure we'll have things to discuss with Judge Noel.

7 MAGISTRATE JUDGE NOEL: Between A and S, anemic
8 and substantial, there's got to been an N or an L word in
9 there somewhere.

10 MR. HULSE: I can amend to complete, but --

11 THE COURT: Right, I was just going to let
12 Mr. Gordon know that if you come to Minnesota in the winter,
13 everybody looks kind of anemic.

14 MR. GORDON: I will tell you by way of full
15 disclosure, I actually come from North Florida, which is not
16 like here, but it is cold. So I've been in Aruba on
17 vacation for a week, so that's why I'm not as anemic as I
18 might otherwise be.

19 THE COURT: Bragging.

20 MR. HULSE: I'm willing to test the North Florida
21 definition of cold anyway.

22 THE COURT: Yeah, do you know what a wind chill
23 is? I bet he knows what a heat index is but he doesn't know
24 that windchill is.

25 Okay, so that will be good. Partly I'm curious,

1 and I'm sure Judge Noel is curious too about how things are
2 going on.

3 MAGISTRATE JUDGE NOEL: I just have a question
4 when you talk about the issue regarding preservation of
5 evidence extending to third parties and discussing that in
6 chambers, is that reference to this cryptic note in
7 paragraph 17(b) of your additional issue thing?

8 MR. GORDON: It is, Your Honor.

9 MAGISTRATE JUDGE NOEL: Okay.

10 MR. GORDON: And there are things that we can say
11 and not say. I just as soon --

12 MAGISTRATE JUDGE NOEL: That's fine. I don't want
13 you to say anything you don't want to say. I just want to
14 make sure that I'm on the same page as to what we're talking
15 about it.

16 MS. ZIMMERMAN: And if I may, Your Honors, while
17 there's been certainly litigation that has commenced in
18 various state courts, for example, in Ramsey County there
19 have been complaints filed and there was a hearing. There
20 is now a brief that has been submitted requesting Lone Pine,
21 but there is not responsive. And there's no discovery
22 that's been done, there's no protective order, there's no
23 preservation order, there's no documents exchanged, nothing
24 like that has happened. There's been no Rule 12 motion, so.

25 THE COURT: Isn't there a March 25th hearing

1 scheduled in state court?

2 MS. ZIMMERMAN: So at this point, Your Honor,
3 there was to be a hearing next week in front of Judge Leary.
4 Defense counsel and 3M have requested the opportunity to
5 brief the issue of Lone Pine order at this stage in the
6 proceeding. We have now reached agreement on an extension
7 of a briefing schedule and that hearing has been cancelled.
8 It has not yet been rescheduled. It is our expectation it
9 will likely be heard at the end of March, but it's not
10 rescheduled at this point.

11 THE COURT: Okay. So the 25th showed up in both
12 February and March. So I think initially you were all to
13 appear again on February 25th. And, fortunately, you don't
14 have to do that again. And when Judge Leary and I talked on
15 the telephone, we were both of the same mind that there's no
16 point having you come unnecessarily, so we're trying to
17 coordinate as much as possible. But then I thought that
18 there was a March 25th hearing date on the Lone Pine but
19 that's maybe going to happen and maybe not.

20 MS. ZIMMERMAN: This is inside information and
21 Mary and I are waiting for a call back from Jeremy in Judge
22 Leary's chambers.

23 THE COURT: Okay. Plaintiff's initial
24 disclosures. That is probably related, is that going to be
25 tied in with the issue of whether there should be staged

1 discovery?

2 MS. ZIMMERMAN: Yes, Your Honor. To some extent,
3 so defense counsel we have suggested that we would meet and
4 confer about a plaintiff fact sheet, which is typically done
5 in these cases, or perhaps even a preliminary disclosure
6 followed by a more robust plaintiff's fact sheet. Defense
7 counsel's, I think, initial position, and I'll let
8 Mr. Blackwell make that argument, is that rather than
9 starting there, that they want to have Lone Pine order
10 entered prior to Rule 12 or any other procedural discovery
11 mutual of that kind, and I'm graciously letting you jump in
12 here to make a brief argument on that.

13 THE COURT: It sounds like we're on that issue
14 now, doesn't it?

15 MAGISTRATE JUDGE NOEL: I think we've jumped to
16 it.

17 THE COURT: We've arrived at the nub.

18 MR. BLACKWELL: If we've arrived at that, Your
19 Honor, if I could have just a couple of minutes to tee up
20 where our concern is, and it isn't just needing a Lone Pine
21 order. It's broader than that. It is part science
22 indicates. We think, for example, it would be helpful to
23 have a science day, Your Honor, which would be a half day or
24 a whole day.

25 THE COURT: We can all do projects. We can work

1 on my science project. I'm going to make a diorama.

2 MAGISTRATE JUDGE NOEL: I'm going to make a
3 density jar.

4 MR. BLACKWELL: I was in one in front of Judge
5 Weinstein in New York a couple months ago. It was very
6 fascinating to question the expert early on in the case, but
7 the purpose of it would be to educate the Court about the
8 product itself, the science supporting the plaintiff's kinds
9 of claims, the responses the defense has to the science,
10 just to give the Court a good backdrop for understanding
11 what the issues are with respect to the science because this
12 is ultimately a science case. It's what it's all about.
13 Causation.

14 Your Honor has before the Court now 139 cases, a
15 hundred of which are already filed here in the district. I
16 will represent to the Court that the cases all have
17 something in common, a few things in common. They all
18 claim, just about, I say generally they claim that there's
19 been an orthopedic surgery of some kind. They claim that
20 the Bair Hugger was used with a patient warming device that
21 reduces the likelihood of unintentional hypothermia in
22 surgeries. Afterwards, they claim that there was an
23 infection that developed.

24 Now, Your Honor will find that in 70 percent of
25 the cases, there is no statement about what type of bacteria

1 even caused the infection. In none of the cases is there
2 anything that traces the bacteria back to the Bair Hugger
3 device. So if they anticipate thousands of cases, Your
4 Honor can anticipate thousands of cases where there is no
5 specific claim of a specific bacteria that ties back to the
6 Bair Hugger device.

7 Our concern is the same kind of claims could be
8 made about anything in the operating rooms. There's nothing
9 in there surgical, is sterile, whether if the claim is that
10 we had a surgery, afterwards we developed an infection,
11 claims could be made about the ceiling tile, the ventilation
12 system, the shoes that were worn, anything in the operating
13 room, but the plaintiffs have here asserted that the Bair
14 Hugger caused a surgical site infection. There's no
15 scientific study that has ever associated an infection
16 causing bacteria to the Bair Hugger. There isn't any.

17 A product that's been on the market 25 years.
18 Millions of uses, used 50,000 times a day, FDA cleared,
19 never subject to a recall. So our concern in this case is
20 that upfront is where is the evidence of causation? Both
21 general causation, can the Bair Hugger cause a surgical site
22 infection? And specific causation, did it do so in this
23 instance in this case?

24 And so what we've asked for, and the Court has the
25 discretion and authority to do it is to prioritize the

1 science. It's clear enough that if causation is established
2 in this case, we have many things to argue about. If there
3 is no causation, there's only one thing to argue about in
4 the case, and that is that there isn't causation
5 established.

6 So since we have to get at issues of causation,
7 scientific cause in any event in this, our request is simply
8 that it be prioritized on the front end. It will save the
9 Court a world of headache, resources, and time in motion
10 practice of things unrelated to this. So to the extent
11 there's discovery, let's have discovery on the issue of
12 causation first.

13 To the extent the plaintiffs have already made
14 allegations in their complaints that the Bair Hugger caused
15 the surgical site infection, we in fact have asked for Lone
16 Pine order to have some proof from a competent medical
17 professional that the Bair Hugger in fact did cause,
18 according to the plaintiffs, the surgical site infection.

19 Now, I represent to the Court that in front of
20 Judge Leary, we argued for 50 minutes over just whether this
21 issue should even be briefed. That's how serious it was for
22 plaintiffs. Judge Leary heard it over plaintiff's
23 objections. We are not having briefing on Lone Pine.

24 What we're asking here now, Your Honor, if we're
25 not going to get this accomplished today, is to have a

1 similar opportunity with this Court to be able to set forth
2 our position for why science first makes sense in this kind
3 of a case. There is some precedent in the Baycol litigation
4 for Lone Pine orders where the Court here entered one, and
5 it was obvious enough at some point in the MDL that the
6 Court has an interest in trying to potentially resolve the
7 cases. And it's very helpful to know which claims have
8 proper substantiation and which ones do not, if the goal is
9 to try and resolve them as a group.

10 But our concern here is, and I appreciate Your
11 Honor asking us to be straight forward about what's going on
12 and major concerns, this is the major concern is that this
13 is a science case. If there is no causation, there's not
14 anything else really to talk about. The science is
15 questionable, 70 percent of the cases filed already don't
16 even state what bacteria is involved in the infection, much
17 less trace it back to the Bair Hugger device, which has got
18 to happen, and we think that ought to be front loaded. And
19 it would save I think a world of headache and resource and
20 expense for both the Court and all the parties. And I was
21 hopeful that the plaintiffs will be as excited about this as
22 we are since presumably they don't want to waste their money
23 either. But as it turns out their interest has been
24 somewhat anemic, Your Honor.

25 THE COURT: Yeah, that's a meaningful statement

1 coming from you.

2 MR. BLACKWELL: So, Your Honor, I'll stop there,
3 but that essentially tees up by way of introduction what
4 we're seeking by way of science first, and the components
5 would be seeking a science day, an opportunity to educate
6 the Court. And we would invite the Court to invite Judge
7 Leary, and invite the other state court judges even. When
8 we were in New York in front of Judge Weinstein, the other
9 members of the bench were there too. The magistrates heard
10 it. It was non adversarial.

11 THE COURT: Sort of like a patent tutorial maybe.

12 MR. BLACKWELL: Absolutely, Your Honor, and so we
13 then also seek the Lone Pine order, Your Honor, is a part of
14 this. And then, finally, we would want or request that the
15 discovery be staged such that the focus and discovery on the
16 front end and this is discovery that's related to general
17 causation. And we could have early Daubert hearings to kind
18 of get at that, and there's some precedent for doing that.
19 The Court clearly has the discretion.

20 THE COURT: Okay, thanks, Mr. Blackwell.

21 MAGISTRATE JUDGE NOEL: I just have one question,
22 Mr. Blackwell. In the Walton, and what's the other case?

23 MR. BLACKWELL: Johnson, Your Honor.

24 THE COURT: Johnson case, has there been any
25 expert disclosures? Do you know what their claims are about

1 how this Bair Hugger is causing what they claim it causes?

2 MR. BLACKWELL: Your Honor, there were expert
3 reports that were submitted in Walton and Johnson. What the
4 Court will find once we get into this issue in looking at
5 what is the credible science, even in those reports, there
6 still was no scientific study that anyone can cite that ever
7 tied an infection causing bacteria to the Bair Hugger of all
8 the myriad different sources and causes of potential
9 surgical site infections. And I might add that the CDC, the
10 Center For Disease Control, points out that the most common
11 cause for surgical site infection is the patient's own skin
12 because bacteria lives beneath the skin and sweat ducts and
13 hair follicles, and any time there's an incision made, it's
14 necessarily infected with a bacteria typically from your own
15 skin.

16 THE COURT: Thank you.

17 MR. GORDON: Your Honor, may I use the podium?
18 I'll refer to my iPad and some notes. And if I may, I'd
19 like to approach and give copies for the defense counsel and
20 for the Court of an article, since we're talking about
21 science, a published scientific article from the Journal of
22 Bone and Joint Surgery from 2011 concerning this very issue.

23 THE COURT: Can we hear your words first before we
24 get that because I know from my days of trying cases that if
25 you give people something to read, they won't listen at the

1 same time.

2 MR. GORDON: Great point, Your Honor. Thank you
3 for that. I appreciate that very much. I'll have these for
4 you and defense counsel after, and they're familiar with the
5 study. For the record, it's the McGovern study when we get
6 to science.

7 A moment if I could first about Lone Pine and,
8 ultimately, I'd like to have co-lead counsel Genevieve
9 Zimmerman and Ms. Conlin too if she wishes to discuss the
10 procedural rules and why we think this is getting the cart
11 very much ahead of the horse.

12 THE COURT: I have some thoughts on that myself,
13 so maybe before we spend too much air on it, I can give you
14 my sense and my thoughts about it and then we can have a
15 conversation about it, but I did a little reading and so on.

16 MR. GORDON: I'm always a fan of having the Judge
17 educate me about what I'm trying to educate the Court on
18 beforehand if possible. Would you like to go first, Your
19 Honor?

20 THE COURT: No, no, but just by way of
21 introduction, before you have everybody go into great detail
22 about it.

23 MR. GORDON: Great, thank you, Your Honor. I will
24 say that we want this to be an expeditious process as you
25 said also. We want it to be a fair process, and we want the

1 rules to be followed. And the rules we believe are there
2 for a reason.

3 Lone Pine is an exceptional process. There's only
4 10 published opinions in history since 1986 **Lore v. Lone**
5 **Pine** case from the State Court in New Jersey that we could
6 find.

7 THE COURT: It makes a stack this big I know
8 because I asked Holley to copy them all.

9 MR. GORDON: And of that stack this big, the stack
10 that concerns medical devices is that big, zero, nada.
11 There are no cases that we could find involving a medical
12 device where a published Lone Pine order was issued.

13 THE COURT: What about this Baycol case? Were you
14 involved in Baycol?

15 MR. GORDON: Peripherally, I did have a few of
16 those cases. I was not involved in the MDL. My
17 understanding is, and again Ms. Zimmerman was, she can
18 address this, it was very late in the process. It was sort
19 of a cleanup after these other matters were handled,
20 12(b) (6), summary judgment, bellwether, all of that happened
21 before the Lone Pine process took place, to my
22 understanding, but again I wasn't directly involved. I just
23 had a handful of those cases.

24 I will say, you know, again in terms of just the
25 scope in general of the Lone Pine ruling and its progeny, if

1 you will, we're talking about apple and oranges. We're
2 talking about cases principally that involved exposure to
3 toxic substances and then largely ephemeral toxic substances
4 that are hard to trace and hard to know whether the
5 plaintiff was even exposed ab initio to that substance, like
6 uranium and things from landfills that plaintiffs who sued
7 hundreds of defendants just sort of threw mud against the
8 wall to try to see if they could catch a defendant that
9 happened to contaminate a particular plaintiff. That's not
10 the case here, Judge.

11 In every single 139 of these cases that have been
12 filed, and I hope every single case that gets filed we're
13 going to have proof positive empirical evidence that they
14 were exposed to the offending product, the Bair Hugger. If
15 not, it can be discovered in a very quick preliminary
16 disclosure form that Ms. Zimmerman mentions or in a
17 plaintiff's fact sheet and that case probably should be
18 dismissed if the wrong product is involved.

19 So whereas Lone Pine is generally dealing with
20 cases where there is a very serious threshold question about
21 whether the plaintiff was even exposed to the toxin or to
22 the substance. Here that's not a question. We can figure
23 out very quickly if the plaintiff was exposed to the Bair
24 Hugger.

25 Now, the next question and to get to the science

1 of whether exposure to that product increased the
2 plaintiff's risk generally and specifically to a microbe is
3 a question of science, as Mr. Blackwell points out, but it's
4 a question that the discovery process has to inform. We
5 have done our due diligence. We have satisfied Rule 11. We
6 are meeting with physicians, and we are meeting with
7 plaintiffs, and we are reviewing their records and vetting
8 the cases carefully to ensure that they have developed a
9 microbial infection in close temporal proximity to exposure
10 to the offending product, the Bair Hugger blanket.

11 And we have experts, in fact, some of which we're
12 meeting with next week, very esteemed experts who have
13 looked at the literature including the McGovern study, which
14 is the seminal paper so far on this issue which found a
15 nearly quadrupling instance or prevalence of development of
16 microbial infections in patients exposed to the Bair Hugger
17 as compared to patients who were warmed by other means, in
18 this case fabric blankets. In other words, blankets that
19 did not involve the blower.

20 So this is one of the blankets, Your Honor, and as
21 you can see, and we can give this to you if you would like.
22 May I bring it up, Your Honor?

23 THE COURT: Later.

24 MR. GORDON: Okay, so this like an inflatable,
25 sort of like an air mattress you have in your swimming pool,

1 but a little smaller, a little thinner. It has holes in the
2 bottom, or depending on which kind it is, that actually blow
3 hot air from a hose that's connected to a wall mounted or a
4 floor mounted, essentially looks like a vacuum cleaner, but
5 it's a forced air blower. So this is one of the devices
6 sort of like a canister, like a shop vac almost.

7 And there are questions about, you know, whether
8 or not it's HEPA compliant that we can talk about. There
9 are a lot of science questions and a lot of discovery that
10 has to be done in the files of the original company Arizant
11 Healthcare and 3M when they made the purchase in 2010 about
12 exactly what the degree of cleanliness of these devices may
13 be or may not be and the hoses and the machines, what the
14 cleaning protocols are.

15 But, fundamentally, our theory of the case is that
16 the device is defectively designed because you bring it into
17 a setting where you know you have microbes. We know there
18 are bugs. As Mr. Blackwell correctly pointed out, people
19 come in with bugs on their skin. O.R. people have bugs on
20 their skin. There are bugs everywhere. We know hospitals
21 are dangerous dirty places. We go in with that presumption.

22 But the goal of the surgical staff, and the reason
23 that the doctors walk around like this with their hands in
24 the air is they don't want to get to where the bugs are
25 because they're dropping off of skin. They are dropping off

1 of cavities from the body. There are bugs all over the
2 floor.

3 THE COURT: Speak for yourself.

4 MR. GORDON: Present company excepted, Your Honor.
5 But we know that there are bugs circulating in the operating
6 room. What we want to do as the medical community wants to
7 do is minimize the patient's exposure to those microbes.
8 There is something called the SCIP protocol, the Surgical
9 Care Improvement Project. I think it was 2001 or 2003. And
10 this all came about because of surgeons in hospitals
11 concerns over these very issues. How can we make hospital
12 operating rooms cleaner, safer places, and keep the
13 percentage of infections down?

14 The last thing they envisioned, and what our
15 experts will tell you, and this is an evolving science. I
16 will concede, Your Honor, and it takes time for the science
17 as Mr. Blackwell and I have talked about. But what they
18 will tell you is the last thing you want to do in a place
19 where there are microbes on the floor and maybe sometimes on
20 the patient's skin is introduce into that a hot air blowing
21 machine that's a thousand or 1100 watts that churns up this
22 microbial environment and allows these bugs to go up into
23 the sterile field.

24 Now, I realize that's our burden to prove that,
25 but we do not have to prove that a specific bug on a

1 specific day entered a specific patient to cause their
2 infection and that it was necessarily propionibacterium
3 acnes or the most common one: MRSA, Methicillin-resistant
4 Staphylococcus aureus. There are a litany of these bugs.
5 They are ubiquitous.

6 The fact is that most of the clients that we have,
7 they know that they develop an infection. They know they
8 developed it in close proximity to the surgery and to the
9 use of the Bair Hugger. And what we end up with based on
10 the statistics and that is the epidemiology that's been done
11 and it's being done, as well as the case reports that do
12 exist, notwithstanding Mr. Blackwell's belief that the
13 science doesn't say what I think it says.

14 You have a doctor who has to take that data and
15 then perform a differential diagnosis. The doctor has to
16 ascertain whether in a particular plaintiff in a particular
17 instance there was something that explained the causation of
18 their particular microbial or bacterial infection.

19 If the patient comes in with known MRSA, that's a
20 problem for us. If the patient comes in with other
21 confounding pre-existing and co-existing medical problems
22 that would explain their propensity to have developed an
23 infection on that day, probably it's going to be a very
24 difficult plaintiff's case, and a very difficult thing for
25 that surgeon to say I believe the Bair Hugger was more

1 likely than not within a reasonable degree of medical
2 probability the source of the infection in this case.

3 THE COURT: Okay. Let me ask you a couple of
4 questions.

5 Do you have a different idea if we don't have a
6 Lone Pine, which I was surprised Lone Pine is actually named
7 after a dump. You know, we talk about it like it's some big
8 huge case.

9 MR. GORDON: Right, a landfill.

10 THE COURT: It turns out it's people living next
11 to the Lone Pine dump.

12 MR. GORDON: Right.

13 THE COURT: But if not a Lone Pine Order, which
14 seems to be a pre-Rule 12 Order and it's extraordinary in
15 that it requires --

16 MR. GORDON: Of course, it's to pre-try our case,
17 Your Honor.

18 THE COURT: Right, right. So if we set aside
19 whether it's a Rule 12 process, a Daubert process, a Rule 56
20 process, and get rid of the title "Lone Pine," and if there
21 were to be not a requirement that you make initial
22 disclosures similar to at least in Minnesota you've got to
23 make some if in a medical malpractice case, you have to have
24 an expert.

25 So what's the plaintiff's view of staged discovery

1 and focusing on general causation as opposed to specific
2 causation partly because the general causation would be
3 something that would be appropriate for the MDL procedure
4 because it would affect all of the cases. So do you have
5 thoughts on the appropriateness of staged discovery or the
6 timing of the scientific hearing?

7 MR. GORDON: I guess, Your Honor, my initial gut
8 reaction is I think the rules amply cover the plaintiff's
9 burden to adduce and proffer credible colorable evidence to
10 support their claims without the injection of a stratified
11 or a staged process.

12 Now, I haven't given your specific question a lot
13 of thought, and I guess I would like to talk to my
14 colleagues about it, but in general, I will tell you that we
15 go through, we as the plaintiff's bar, a very exhaustive
16 vetting process for these cases. And if you ask anyone in
17 the country, and I've spoken about this, and we have met
18 exhaustively about it, the reason there are only 139 cases
19 filed so far in the amount of time that this case has been
20 going on and the couple of years for the Walton/Johnson
21 cases, is because we have been extremely careful and
22 judicious in the vetting process to try to exclude and cull
23 out spurious or tenuous cases.

24 Now, I can't stand here and say, Your Honor, that
25 some of them slipped through the cracks. But I believe a

1 process to help, you know, winnow those out would be to
2 establish a very good preliminary disclosure form and
3 plaintiff's facts sheet that will require certain bona fide
4 that the plaintiffs have to proffer to the defendant and to
5 the Court after which there may be some cases that get
6 culled out because they don't meet the criteria that we have
7 all, you know, discussed and worked to live up to. What we
8 certainly don't want to file cases that aren't meritorious,
9 and we're doing everything we can proactively to prevent
10 those from being filed upfront.

11 THE COURT: Okay. Thank you very much. And now
12 I'll take the --

13 MAGISTRATE NOEL: I was going to ask a question
14 about the study and then maybe we can just preview for me,
15 was the study going to answer this question, which is the
16 one I have, is it the plaintiff's theory that these microbes
17 are just being blown around by the air coming out of the air
18 mattress-like device and therefore getting themselves into
19 the surgical site? Or is it the plaintiff's theory that the
20 machine itself is sucking these bacteria into the machine
21 and then blowing them out directly into the surgical site
22 through the mattress?

23 MR. GORDON: It sounds like Your Honor has read
24 our Complaint. I would say principally the former, but we
25 haven't exhaustively completely with experts ruled out the

1 latter. And I would ask that if we get down into the weeds
2 on this terribly much, I might ask Gabe Assaad or David
3 Hodges, who are the lawyers, David on our PEC, Gabe is one
4 of his partners who have handled most of the depositions
5 thus far who have been working on this case for two years
6 and understands the science frankly better than I do at this
7 point.

8 But I would say that the question of whether a
9 specific microbe on a specific day may lay dormant in a
10 hose, in a tube, in the machine, and then be transferred
11 more directly to the plaintiff is a question that I don't
12 know has been definitively answered. Again, they may have
13 more data on that than I do.

14 The basic theory of the case is the former that
15 you enunciated, Your Honor, and that is that the design of
16 the machine is fundamentally flawed in that it churns up
17 microbes below the patient, below the sterile field, and
18 allows them -- what happens --

19 THE COURT: So they would come in underneath the
20 Bair Hugger, not through the Bair Hugger primarily --

21 MR. GORDON: Yes, Your Honor, exactly.

22 THE COURT: But you're not ruling out the
23 possibility that some microbes can squeeze out through the
24 membrane that's enclosing the warm air.

25 MR. GORDON: I think that's well stated, Your

1 Honor.

2 THE COURT: Okay.

3 MR. GORDON: And I'll say there's a downward air
4 flow. One of the things these articles speak to, and we can
5 give them all to Your Honor if we are going to go down this
6 science road. And to get to your question, Your Honor,
7 about timing on a Daubert-type setting. We're not afraid of
8 Daubert or Frye-Mack or a science day. We love science. I
9 mean we're science geeks. It's just not time yet, and we
10 can talk more about what we think the timing may be.

11 But I will say that there is a great deal of
12 literature and data that suggests that positive air flow,
13 some studies call it laminar. That's principally the rubric
14 used and the technology used in Europe. But in the United
15 States, there's positive generally downward vertical air
16 flow that comes across the top of the plaintiff, and the
17 idea is that it gently presses, suppresses bugs, microbes
18 down to the floor. So if there are ubiquitous microbes on
19 the patient, on the doctor, on the instruments that those
20 will fall to the floor, or be gently pressed to the floor.

21 THE COURT: You don't want something to counteract
22 that.

23 MR. GORDON: Exactly, to push them back up.

24 THE COURT: Okay, so the question is when should
25 we have some evidence about this whole thing? And when

1 should we have a preliminary science day again similar to
2 what I sometimes have if I've got a really complicated
3 patent. We're sort of having a science day right now but
4 without any scientists.

5 MR. GORDON: Well, Your Honor, that raises a good
6 point.

7 THE COURT: When are we going to have a science
8 day?

9 MR. GORDON: What we might do, and I'm just
10 throwing this out there. We have lawyers in this audience,
11 Mr. Coffin, who has done this a great deal; Mr. Parekh,
12 Mr. Goldenberg, who have done some of these kinds of science
13 days in other pharma cases. It's not that different.

14 And what we do sometimes, if Your Honor wants to
15 go down this road, is have a preliminary day where just the
16 lawyers come in and present their case like we're doing
17 today but in more depth with graphs and charts and
18 literature, but without the expense and the burden and the
19 time of pre-trying our case with our experts now before the
20 discovery has been done.

21 THE COURT: Okay. Let's put the notion of any
22 kind of a show and tell science day type thing to the side,
23 and let me ask Mr. Blackwell a question.

24 MR. GORDON: Thank you, Your Honor.

25 THE COURT: Thanks, Mr. Gordon.

1 MR. GORDON: Your Honor, may I deliver these
2 studies or would you like to wait until the very end?

6 MR. GORDON: Well, it's just one. I'm only going
7 to give you one today.

10 MR. GORDON: I think he's prepared to talk about
11 McGovern.

12 MR. BLACKWELL: We have 170, Your Honor.

15 MR. GORDON: Thank you, Your Honor. I'm bringing
16 a copy to the defense counsel too. I've got one for each of
17 the judges and one for defense counsel. Thank you.

1 know what it was. But so it's my understanding that it is a
2 sort of Order that's issued immediately before discovery.
3 It's something that would take the place of ordinary
4 discovery, and it would be in a case where there's a
5 question about whether plaintiffs have or have not met the,
6 you know, whether they can I suppose meet Iqbal because it's
7 always talked about in the context of Rule 12.

8 Now, don't the Rules of Civil Procedure provide an
9 equally effective mechanism for staging discovery, if there
10 is one big question that overrides things, could that be
11 determined after there's discovery in more or less than
12 normal course? So I guess that's why the efficiencies that
13 you're talking about don't necessarily lead me to conclude
14 that we'd have to ride in and have some extraordinary kind
15 of order where we required an unusual scientific showing.
16 You know, where basically I would impose the medical
17 malpractice pre-filing disclosure requirement on the case.
18 Can't we get to the same place just using the rules as they
19 already exist, the procedures?

20 MR. BLACKWELL: Your Honor, it really is purely a
21 matter of efficiencies. And what a Lone Pine-type order
22 does, I think preferably on the front of the case and the
23 trend now to the extent that there is one in federal courts,
24 the current thinking is that Lone Pine orders have tended to
25 be entered too late in cases once the courts learn that

1 they're spending lots of time and resources in disputing
2 cases where the most fundamental thing isn't established.
3 That is there is a significant medical causation issue, and
4 there's no case specific report from an expert, that is time
5 to gather causation.

6 And so what it does for the Court is preserves its
7 resources so you're not spending them on cases that don't
8 need to be litigated over given what's fundamentally missing
9 from them, and that could be found out through summary
10 judgment, Daubert motions, et cetera, but that's further
11 down the line, and lots of time and resources can be
12 expended.

13 THE COURT: Well, some of the criticism of a Lone
14 Pine procedure that you can glean from the few appellate
15 cases that are there, it's mostly appellate cases that are
16 in that little stack, is that it's a very important
17 decision, and it can be unfair to make that decision before
18 there's been reciprocal discovery.

19 So maybe what I'm trying to ask is is there not a
20 benefit to having reciprocal discovery even if it's on the
21 limited issue of general liability and then have an early
22 Rule 56 or 702 hearing. But then there would be, I can't
23 imagine that the plaintiffs would object to that, but there
24 does seem to be an unusual aspect of putting it in the
25 Rule 12 context where the burden of coming forward with the

1 evidence is on the plaintiff, and there's not the
2 opportunity for reciprocal discovery. So I don't hear you
3 saying I don't want them to have reciprocal discovery, it's
4 just if we spend a lot of time agonizing over whether the
5 early disposition of a key issue takes place before Rule 12
6 or after discovery in the Rule 56 context, I just wonder if
7 that's productive. It does seem that there's a fundamental
8 decision, and there's some legal issues that are in there of
9 what has to be shown before an individual case could go
10 forward.

11 MR. BLACKWELL: And, Your Honor, while Lone Pine
12 or that type of concept is referred to as an extraordinary
13 approach, what it's asking for is in fact not all that
14 extraordinary because as one federal court recognized, a
15 Lone Pine order merely requires information which plaintiffs
16 and their counsel should have possessed before filing their
17 claims.

18 THE COURT: Yeah, but that case, that's the
19 Eleventh Circuit case?

20 MR. BLACKWELL: It's from the Eastern District of
21 Pennsylvania.

22 THE COURT: But in that case what was required was
23 information that would be more on the order of did this
24 patient have a Bair Hugger during his or her surgery?
25 That's how I -- if I'm remembering that case correctly and

1 as we've already established my memory of cases can be
2 blurry, it wasn't very complicated scientific evidence. The
3 Court said the plaintiffs should have had this at the time
4 they filed their complaint. And so it's just basically
5 saying you have to flesh out your complaint a little bit
6 more.

7 And I hear what you're saying about how the
8 plaintiff should in your view in their complaint say this is
9 exactly how the Bair Hugger caused the injury. And so then
10 we come to the legal issue that I alluded to that's lurking
11 here, what is the required showing?

12 Here, whatever that showing is, whether it's a
13 higher or lower standard, it's going to require scientific
14 evidence. And as to the scientific evidence, I, as an
15 initial matter, had a hard time imagining that I would want
16 to decide that without there having been some reciprocal
17 discovery. So that's how I get to, okay, Lone Pine, I don't
18 know exactly what it means in federal court, but it seems to
19 be before reciprocal discovery. And so that's where I come
20 from. When I finally thought, okay, now I'm getting a sense
21 for what these things are, it's a requirement for a showing.
22 And in this case, it would be a scientific showing prior to
23 robust reciprocal discovery on that issue. So my sense of
24 it was that it would make sense to have staged discovery so
25 that there's not a lot of wasted time, but not to try and

1 get it all done immediately before there's discovery on the
2 general causation matter. That was my sense, and obviously,
3 this is the first time here, so I maybe don't know anything.

4 MR. BLACKWELL: Well, Your Honor, there is a maxim
5 that comes to mind as I listen to Your Honor that law should
6 lag science and not in fact lead it. And if the plaintiffs
7 in their Complaints are saying not just that there was a
8 Bair Hugger used and the plaintiff now has an infection, the
9 plaintiffs are in fact pleading and alleging that the Bair
10 Hugger caused it. It's already been said. It's out there.
11 It's a positive averment.

12 The question that Lone Pine asked and that needs
13 an answer is who says so? Is it simply the ipse dixit of
14 lawyers saying this? Or where is the competent medical
15 person who backs up that claim, the assertion that is
16 already made? And so in my view it's as though they've
17 already boarded the litigation train and on their way to
18 trial. And when the conductor asks them where is the
19 ticket, which you are supposed to have before you start on
20 this train, they want to conduct discovery on the conductor,
21 the train company, and the other passengers on the train,
22 when they supposedly already had a good faith basis for
23 making this claim grounded in the opinion of a medical
24 professional before they made the assertion.

25 And so Lone Pine to me is a threshold-type

1 standard that you have made the assertion on Rule 11(b) (3),
2 who says so? And do you have a competent medical
3 professional who says so? Was it sufficient for simply to
4 have the lawyers allege it? And so once we're passed that,
5 the fact that a competent medical professional says that
6 doesn't make it admissible. We still have all the Daubert
7 issues and other issues that have to get addressed as to
8 whether that's an admissible opinion.

9 But first and foremost, if you've made that
10 assertion under Rule 11, there must be a good faith basis
11 for having made it, which means it needs to be grounded and
12 a proper opinion from a medical professional. And all that
13 Lone Pine is asking is where is your ticket? Since you made
14 that assertion, you should have that before you file the
15 suit and make the assertion.

16 THE COURT: One thing that we should talk about is
17 what, and maybe this is going to bump into some choice of
18 law issues, but what showing is required? Is there a
19 requirement that there be a specific microbe? And it sounds
20 right off the bat that there's going to be disagreement
21 about that is they don't show a microbe. They say they
22 don't have to show what microbe.

23 They say that there's some study, maybe it's in
24 the McGovern study, which I haven't had a chance to fully
25 digest, that says that the Bair Hugger makes it four times

1 more likely that you're going to get an infection in
2 surgery. So then there's a question let's say they can show
3 it makes it four times more likely? What does that mean in
4 terms of either Rule 12 or does that get them over 12(f)?

5 MR. BLACKWELL: Sure, Your Honor, a fair question
6 and, obviously, if I take plaintiffs' assertions about
7 McGovern, which I add is not what the study says, and I'll
8 talk about that in just a minute because it flat out says at
9 the end of the study that its findings, conclusions do not
10 establish causation.

11 THE COURT: Yes, and what I'm not prepared to talk
12 about what the state of the science is, but I'm trying to
13 isolate what are going be the legal issues, and then once we
14 figure out what questions have to be answered, then we can
15 address what procedures we should put in to make it so that
16 we can get the information necessary to answer those
17 questions.

18 MR. BLACKWELL: But, Judge Erickson, your specific
19 question having the plaintiffs at the end of the day simply
20 allege that this or that increases the risk of probability
21 does not establish causation.

22 THE COURT: Okay. All right. And so that's where
23 if -- that would be a Rule 12 issue then.

24 MR. BLACKWELL: It would be, Your Honor, yes.

25 THE COURT: If the Complaint says we can show they

1 used the thing, it makes it four times more likely, and then
2 you come in and say dismiss because that's not a sufficient
3 allegation.

4 MR. BLACKWELL: Right. An increased probability
5 of rain does not mean it rained, Your Honor.

6 THE COURT: Gonna rain.

7 MR. BLACKWELL: Gonna rain or did rain.

8 THE COURT: All right. Well, that's complicated.

9 MAGISTRATE JUDGE NOEL: So if I heard you
10 correctly, Mr. Blackwell, even after this Lone Pine
11 proceeding and putting the plaintiffs through the necessity
12 of establishing a scientific basis for their claim, that
13 there is still going to be Daubert questions about
14 admissibility and whatnot. What's the point? What have we
15 gained by having this early determination, if we're not
16 going to make a law of the case kind of determination that,
17 okay, they passed that hurdle, now let's talk about the
18 other issues?

19 MR. BLACKWELL: A couple things, and Lone Pine
20 ostensibly is conceptualized as a way of staging the
21 discovery aspect of the case, which is different from a
22 Rule 12 motion in that sense, and the standard is different
23 also.

24 THE COURT: Well, when I first heard about it I
25 thought, okay, well, that makes sense. And then when I

1 read, I mean I don't know how they did it in New Jersey. I
2 don't know how they're contemplating doing it in Minnesota,
3 but to me staging discovery might, you know, that seems like
4 a pretty normal thing. That seems fair. Everybody has got
5 the same thing, but requiring one side to make -- I mean I
6 don't want to re-do it. I understand what you're saying is
7 we just want them to give what they should have had anyway,
8 but you were going to answer Judge Noel's questions.

9 MR. BLACKWELL: What courts find beneficial about
10 Lone Pine generally is that it can separate wheat from chaff
11 in terms of claims that have merit and deserve taking up the
12 Court's time and resources from those that do not. And it
13 certainly is beneficial, it was in Baycol where the Court
14 found that the order was necessary to identify, evaluate and
15 categorize the claims of those plaintiffs who have and those
16 who do not have factually and legally sufficient support for
17 their alleged claims and injuries or damages, which the
18 Court found was helpful in helping to develop an efficient
19 and effective settlement and mediation program, in terms of
20 attempting to resolve cases, because if you've got this
21 bloated mass of cases that are into the thousands, a number
22 of which don't have any good faith basis in fact, or at
23 least we don't know until well down the road. At some
24 point, it's fairly common in MDLs that at some stage we talk
25 about other cases or trying to resolve them. And if we sit

1 down and try to talk about resolving this mass of cases, a
2 number of which we're saying a number of these cases don't
3 have anyone who says that the Bair Hugger has even caused
4 this infection. There's no way we can even meaningfully
5 talk about it from the defense point of view because it's
6 such a bloated mass of cases. Counsel's comment
7 notwithstanding about how carefully they're chosen.

8 THE COURT: Can't you always file a Rule 12
9 motion?

10 MR. BLACKWELL: Your Honor, you can always file a
11 Rule 12 motion to this mess, and we have Rule 12 motions in
12 all the cases based on statute and other things, Twombly,
13 Iqbal, all of which is coming forth down the road.

14 What courts use Lone Pine as is somewhat of a
15 pre-filter, akin to what happens in med-mal cases where
16 there is an affidavit of some kind from a competent medical
17 professional who says that this conduct has caused this
18 injury, and it's not just lawyers who are making that kind
19 of claim.

20 I will point out for the Court also in terms of
21 the concept of staging general causation. First, it was
22 done here by Judge Magnuson in the In Re Viagra litigation
23 where general causation and the evidence and discovery in
24 the case was front loaded to address the general causation
25 issue.

1 THE COURT: Yeah, that's a pretty common accepted
2 procedure, I think.

3 MR. BLACKWELL: Right. So any other questions for
4 Your Honor, I'm tempted to go into the McGovern case, but
5 I'll wait to see if there's an appropriate time to talk
6 about the science. And I would just say circle it in red
7 because you'll be amazed at what you're going to hear about
8 what really happened in McGovern. So when we say there's no
9 credible science and that was their best shot of telling
10 Your Honor what their science was.

11 THE COURT: Okay, well, we can't talk about that
12 until we at least take a little break. We can't just launch
13 right into that I don't think.

14 Let's work our way down the agenda and make sure
15 we don't have anything else, and then we'll talk about the
16 most effective way to make use of our time today on this
17 Lone Pine stage discovery business, but I want to make sure
18 that we aren't leaving anything else on the table before we
19 come back to that.

20 MR. GORDON: I want to respond, I was going to
21 hope Ms. Zimmerman could respond briefly to the Lone Pine
22 argument that Mr. Blackwell just made.

23 THE COURT: What I would like to do is just take a
24 breather from that whole Lone Pine business, and maybe we'll
25 take a little break or something, but I don't want to get

1 too deep into that.

2 MS. ZIMMERMAN: Just to the extent that we can
3 clarify some of the procedural history particularly in
4 Baycol and some of the other cases that have been cited by
5 Mr. Blackwell.

6 THE COURT: Yes, it seems pretty clear that every
7 case is unique, and in every case we need to figure out
8 what's going to be most effective and efficient in that
9 case, and what do we need? So I am only this concerned
10 about what happened in Baycol, and same thing with the I
11 suppose Stryker, Viagra, any of those cases. They're all
12 different, and so I'm not afraid to issue an order that I
13 think is necessary. I don't need to know that somebody else
14 did it.

15 And if somebody else did it in a different case,
16 well, it's maybe it's a different case, maybe I wouldn't
17 have done the same thing, who knows? So you don't need to
18 be too, -- we'll issue whatever orders are needed in this
19 case, and I just want to make sure that we can have a full
20 discussion about what's necessary to decide what has to be
21 decided so.

22 MR. BLACKWELL: Thank you, Your Honor.

23 MS. ZIMMERMAN: We welcome that opportunity.

24 THE COURT: Okay. Good.

25 All right. The master pleading, Mr. Gordon,

1 that's where you would have a model complaint?

2 MR. GORDON: Yes, Your Honor. The plaintiffs
3 would have a standard sort of master complaint with a
4 check-off short form complaint to just again for efficiency.

5 THE COURT: Yes, that seems common, right?

6 MR. HULSE: Absolutely. All we want to make sure
7 is that all the arguments we've already raised in our 12(b)
8 motions are handled through that process too, that we don't
9 lose them.

10 MAGISTRATE JUDGE NOEL: And you're both talking to
11 each other about that, and you're going to come up with a
12 proposed order for us to enter that basically says what
13 you're going to do, is that correct?

14 MR. GORDON: Yes, Your Honor. We're perfectly
15 agreeable. I think we can work it out. Absolutely.

16 MR. HULSE: Correct.

17 THE COURT: So there are no pending motions
18 because everything that was filed is all stayed, so we'll
19 have to have a new schedule. And I want to talk to you
20 folks about what a reasonable schedule might be but, again,
21 we can't quite get there until we jump over the, I guess we
22 have no choice but to call it the Lone Pine issue.

23 Now, there was some complaints about the Court
24 website. Someone called Cathy and said they couldn't find
25 orders on it, but I think they were there, we checked. So

1 the website I think is as good as we can make it at the
2 moment, but I'm looking for you to have your contributions
3 as was set forth, and it looks like everybody was happy to
4 do that.

5 MR. BLACKWELL: We'll get together and do that
6 also, Your Honor.

7 THE COURT: That's great. I've got a proposed
8 schedule of status conferences. What I don't know is if
9 that's been shared with you.

10 MR. BLACKWELL: It was on the website, Your Honor,
11 so we took it off of there.

12 THE COURT: Well, there you go.

13 MR. GORDON: I think it was addressed in (b) (2) as
14 well, Your Honor.

15 THE COURT: With all the Thursdays and the dates?

16 MR. BLACKWELL: Yes, and the difference in times.

17 THE COURT: How do you feel about that? How do
18 you feel about that time and day, those dates and times?

19 MR. BLACKWELL: It's fine, Your Honor.

20 MR. GORDON: I generally think it's typical of
21 what we've done in others. It's fine. I would say I like
22 the Court's approach to accessibility and the opportunity to
23 perhaps have occasional telephonic hearings if there's a
24 need for that in between, so that we don't have to come to
25 Minnesota necessarily given the diversity of the crowd every

1 time there might be a hearing if the Court is willing to
2 entertain that.

3 THE COURT: And who all do you think is going to
4 come every time we have a status conference? The whole?

5 MR. GORDON: No, Your Honor, something that we
6 discussed, and it's different in every MDL. I will say in
7 this case, given the stridency of the arguments from the
8 other side and the work load we expect to happen --

9 THE COURT: Are you strident or are you anemic?

10 MR. GORDON: Both at the same time.

11 MR. BLACKWELL: We're both robust and reasonable,
12 Your Honor.

13 MR. GORDON: I tend to think we have a big team,
14 but we don't think it's bloated. We have some very unique
15 set of skills in different areas with this group. I think
16 we're going to need most of them here for a lot of these
17 issues, especially the science issues. So I anticipate a
18 lot of them will be coming, but I wouldn't say it would be
19 required for everyone to attend every hearing.

20 MR. BLACKWELL: And, Your Honor, I presume if we
21 wanted a telephonic hearing, you would expect us to comply
22 with the Local Rules 7.3, Your Honor.

23 THE COURT: We're very fond of our Local Rules.

24 Two o'clock I thought would be easier for people
25 who are going to fly in?

1 MR. GORDON: Yeah, I like that idea, Your Honor,
2 thank you. Especially coming from Pensacola, I have to make
3 a connection.

4 THE COURT: Do you go through Atlanta?

5 MR. GORDON: Every time, Your Honor.

6 THE COURT: Yeah, so you must fly Delta.

7 MR. GORDON: All the time, Your Honor.

8 THE COURT: Probably upgraded to first class.

11 THE COURT: The advantage of going through Atlanta
12 is that you get more miles than if you did a direct flight.

13 MR. GORDON: Silver lining.

14 THE COURT: Or the gold or platinum lining,
15 depending. Now, for our lawyer who is on the phone,
16 Mr. Jackson, if you're still there, did you have anything
17 that you wanted to say?

20 THE COURT: Okay, thank you very much. I think
21 we've worked our way through.

22 Counsel for either Mr. Gordon or Mr. Blackwell,
23 anything else that you think we should talk about now?
24 We've got some other matters to take up. We're going to
25 take up in a more focused the way the Rule 12, Rule 56 Lone

1 Pine issue. I'm going to talk to the New Orleans lawyers,
2 and we're going to talk about the steering committee. And I
3 want to talk to the lawyers on that Texas, the Walton, that
4 cryptic.

5 MR. GORDON: Walton, Your Honor, yes. And if it
6 would be possible, I'm co-counsel with David Hodges and Gabe
7 Assaad, if we could bring them with us. I'm sorry, and
8 Coffin as well.

9 MR. BLACKWELL: No objection, Your Honor.

10 THE COURT: Are you in on that?

11 MR. BLACKWELL: Yes, definitely, Your Honor.

12 THE COURT: Do you want to take that up first?

13 MR. BLACKWELL: That would be fine, first.

14 MR. GORDON: Happy to, Your Honor.

15 THE COURT: I imagine with a group this large,
16 somebody wants to at least take a break. So just let's take
17 the, whenever you're ready, the people who want to talk in
18 chambers on that Walton issue come on back. We'll then
19 decide whether we need an in chambers conference on -- well,
20 then we'll have an in chambers conference on the steering
21 committee matter. And then we'll talk about how we're going
22 to proceed with the more substantive discussion that we've
23 deferred. Make sense?

24 MAGISTRATE JUDGE NOEL: Sounds good to me.

25 MR. GORDON: Your Honor, do you want us to come

1 back now or take five minutes and then come back?

2 THE COURT: Come back when you're ready. I was
3 trying to be delicate because you're from the south.

4 MAGISTRATE JUDGE NOEL: But they're still lawyers,
5 and when you say, "when you're ready," they may not be ready
6 until tomorrow.

7 MR. GORDON: I've just been given a good
8 suggestion actually by the more capable female better fair
9 sex here and suggested that maybe it would be best to take
10 up Walton last, so that others who are not involved in that
11 could leave after the rest of the matter is --

12 THE COURT: It depends on how long Walton is going
13 to take, but it's up to you. I am totally in the dark about
14 what that is, so I don't care whether we take it up first or
15 last.

16 MR. BLACKWELL: Your Honor, if it's the
17 plaintiff's pleasure to take it up last, we're fine with
18 that also.

19 THE COURT: All right. Then so ordered. It will
20 be taken up last.

21 MAGISTRATE JUDGE NOEL: So just to be sure, we're
22 going to take a break for five minutes, but everybody go do
23 what they need to do.

24 THE COURT: Right, check their e-mails.

25 MAGISTRATE JUDGE NOEL: Meet in chambers with

1 whom?

2 THE COURT: On the steering committee. So before
3 you come back to chambers, talk to the -- get the steering
4 committee issue squared away if you can, and then come back
5 and let us know whether you're able to take care of that.
6 And then when you're done with that, then I'd like the
7 lawyers who are at the tables to come back and have a
8 conversation about how we can most productively figure out
9 where we're going to go next on the Lone Pine matter.

10 MR. BLACKWELL: Very good. Thank you.

11 MR. GORDON: Thank you, Your Honor.

12 THE COURT: We're in recess.

13 (Court adjourned at 11:00 a.m.)

14

15 * * *

16
17 I, Maria V. Weinbeck, certify that the foregoing is
18 a correct transcript from the record of proceedings in the
19 above-entitled matter.

20

21 Certified by: s/ Maria V. Weinbeck

22

Maria V. Weinbeck, RMR-FCRR

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